No. 88-1208

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SANDIA FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

VS.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
RECEIVER FOR VERNON SAVINGS AND LOAN ASSOCIATION
AND RECEIVER FOR VERNON SAVINGS AND LOAN ASSOCIATION,
FSA
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Federal Savings and Loan Insurance Corporation have adjudicatory power under 12 U.S.C., Section 1464(d)(6)(c) and Section 1729(d) and under Article III of the Constitution of the United States to determine all claims against insolvent savings and loan associations in receivership, regardless of the nature of the claims?

2. If the Federal Savings and Loan Insurance Corporation does have such power, are courts divested of all jurisdiction upon the appointment of the Federal Savings and Loan Insurance Corporation as Receiver for insolvent savings and loan associations?

LIST OF PARTIES

The caption of this case contains the names of all of the parties.

Sandia Federal Savings and Loan Association has no parent corporation. There are no subsidiaries of Sandia, other than wholly owned subsidiaries. There are no affiliates of Sandia.

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REFERENCE TO OFFICIAL REPORT OF OPINION IN THE COURT BELOW

Sandia Federal Savings and Loan Association v. Vernon Savings and Loan Association. et al., 860 F.2d 608 (5th Cir. 1988).

STATEMENT OF JURISDICTION

The date and time of judgment and its entry by the Fifth Circuit Court of Appeals was October 14, 1988. A rehearing was not requested nor was a Motion for Extension filed. The statute granting jurisdiction to this Court to review the judgment of the Fifth Circuit Court of Appeals is 28 U.S.C., Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Article III of the Constitution of the United States, states in relevant part:

> "Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made,

> under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party;— to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> . . . ."

12 U.S.C., Section 1464(d)(6)(c) states:

> "Except as otherwise provided in this subsection, no Court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver."

12 U.S.C., Section 1729(d), Additional Powers of Corporation, states:

> "In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board, or, in cases where the Corporation has been appointed con-

> servator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority."

28 U.S.C., §1254, Courts of Appeals; certiorari; appeal; certified questions, states in relevant part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (l) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
> . . . ."

STATEMENT OF THE CASE

On January 7, 1987, Sandia Federal Savings and Loan Association (hereinafter referred to as "Sandia") filed its Complaint against Vernon Savings and Loan Association (hereinafter referred to as "Old Vernon") in the United States District Court for the Northern District of Texas, Dallas Division. On March 20, 1987, the Federal Home Loan Bank Board (hereinafter referred to as "FHLBB") declared Old Vernon insolvent and appointed the Federal Savings and Loan Insurance Corporation (hereinafter referred to as "FSLIC") as Old Vernon's receiver. FSLIC, as Old Vernon's receiver, immediately transferred most of the assets and liabilities of the failed entity, including those associated with Sandia's claims, to a newly created entity, Vernon Savings and Loan Association, FSA (hereinafter referred to as "New Vernon").

On July 20, 1987, Sandia filed its Second Amended Complaint against Old Vernon and New Vernon alleging fraudulent misrepresentation and breach of contract. Sandia requested relief in the form of money damages, specific performance and for an accounting. Sandia had purchased from Old Vernon participations in 27 loans in the total amount of approximately eighty-three million dollars ($83,000,000). Sandia had advanced approximately sixty-two and one-half million dollars ($62,500,000) of the total amount to Old Vernon at the time of the filing of the Complaint.

On November 19, 1987, FHLBB declared New Vernon insolvent and appointed FSLIC as Receiver for New Vernon. On March 17, 1988, FSLIC, as Receiver for New Vernon, appeared in the case pending before the District Court. The case was scheduled for trial on April 4, 1988.

On March 21, 1988, FSLIC filed a Motion to Dismiss based upon the District Court's lack of subject matter jurisdiction pursuant to 12 U.S.C., §1464(d)(6)(c) and §1729(d). On March 25, 1988, the District Court entered an Order dismissing the case based on the precedent of *North Mississippi Savings and Loan Association v. Hudspeth,* 756 F.2d 1096 (5th Cir. 1985), *cert. den.,* 474 U.S. 1054 (1986). The District Court stated in its Order of Dismissal that Sandia must present its claims to FSLIC under the claims procedures established by the FSLIC.

On April 21, 1988, Sandia filed Notice of Appeal with the District Court and appealed the District Court's Order to the Fifth Circuit Court of Appeals seeking reversal of the Order of Dismissal. On October 14, 1988, the Fifth Circuit

affirmed the District Court's Order of Dismissal citing its decision of *Hudspeth, supra.* The Fifth Circuit stated that Sandia must present its claims to the FSLIC and the FHLBB under their administrative procedures.

The basis of jurisdiction of the United States District Court for the Northern District of Texas was diversity of citizenship.

ARGUMENT FOR GRANTING WRIT OF CERTIORARI

The Court has granted Petitions for Writs of Certiorari in three cases involving substantially the same questions presented in the instant case. There is a conflict between decisions of the Ninth Circuit Court of Appeals and the Fifth Circuit Court of Appeals regarding questions presented in the instant case.

The Ninth Circuit Court of Appeals, in the case of *Morrison-Knudson Co., Inc. v. CHG International, Inc.,* 811 F.2d 1209 (9th Cir. 1987), *cert. granted, sub nom., Federal Savings and Loan Insurance Corp. v. Stevenson Associates,* 56 U.S.L.W. 3249 (U.S. Oct. 16, 1987) (No. 87-451), held that the FSLIC, as Receiver of a failed savings and loan, did not have jurisdiction under Article III of the United States Constitution or under federal statutes to adjudicate disputed claims against failed savings and loan associations. However, the Fifth Circuit Court of Appeals in the case of *Federal Savings and Loan Insurance Corporation v. Bonfanti,* 826 F.2d 1391 (5th Cir. 1987), *cert. granted, sub nom., Zohdi v. Federal Savings and Loan Insurance Corporation,* 56 U.S.L.W. 3196 (U.S. Sept. 29, 1987) (No. 87-255) and in the case of

Coit Independence Joint Venture v. FirstSouth, F.A., 829 F.2d 563 (5th Cir. 1987), *cert. granted*, ___U.S. ___, 108 S.Ct. 1105 (1988) reached the opposite result based on precedent within the Fifth Circuit, in the case of *North Mississippi Savings and Loan Association v. Hudspeth*, 756 F.2d 1096 (5th Cir. 1985), *cert. den.*, 474 U.S. 1054 (1986).

Congress did not intend for the FSLIC to adjudicate disputed state law claims through an administrative procedure, under 12 U.S.C., Section 1464(d)(6)(c) or 12 U.S.C., Section 1729(d). Article III of the United States Constitution allows Petitioner the right to a hearing before an Article III court.

The Court should grant the Petition for Writ of Certiorari.

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Counsel for Petitioner, Sandia Federal Savings and Loan Association

CERTIFICATE OF SERVICE

In compliance with Rule 28.3 and 28.4 of the Supreme Court Rules, I hereby certify that on the 11th day of January, 1989, three copies of the Petition for Writ of Certiorari were deposited in the U.S. Mail, sufficient postage prepaid, to the following and that thereby all parties required to be served have been served:

Solicitor General
Department of Justice
Washington, D.C. 20530

E. Kelly Jones
Managing Officer and Service Agent
for Federal Savings and Loan
Insurance Corporation, Receiver
for Vernon Savings and Loan
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United States Court of Appeals,

Fifth Circuit.

Oct. 14, 1988.

No. 88-1278
Summary Calendar.

SANDIA FEDERAL SAVINGS & LOAN ASSOCIATION,
Plaintiff-Appellant,

v.

VERNON SAVINGS & LOAN ASSOCIATION, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Sandia Federal Savings and Loan Association ("Sandia") appeals the district court's dismissal, for lack of subject matter jurisdiction, of Sandia's claim against Vernon Savings and Loan Association ("Vernon") after the Federal Home Loan Bank Board ("FHLBB") had declared Vernon insolvent and appointed the Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver. We affirm.

I

Sandia purchased participations of twenty-seven loans from Vernon. In January 1987, Sandia

filed an action against Vernon in district court for failing to repurchase some of the loans, allegedly in violation of a participation agreement. While the case was pending, the FHLBB declared that Vernon was insolvent and appointed the FSLIC as receiver. The FSLIC transferred substantially all of Vernon's assets and liabilities to Vernon Savings and Loan Association, FSA ("Vernon FSA"), a new, federally chartered savings and loan association. In July 1987, Sandia filed an amended complaint against Vernon and Vernon FSA. In November 1987, the FHLBB declared Vernon FSA insolvent and again appointed the FSLIC as receiver.

Earlier in November, Sandia had filed a motion for partial summary judgment. After the FSLIC was appointed receiver, the district court ordered that the FSLIC need not respond to Sandia's motion until after the district court ruled on a motion to dismiss which the FSLIC anticipated filing. In March 1988 the FSLIC filed its motion to dismiss, arguing that the district court lacked jurisdiction over Sandia's claims pursuant to 12 U.S.C. § 1464(d)(6)(C), as interpreted by the Fifth Circuit in *North Mississippi Savings and Loan Ass'n v. Hudspeth,* 756 F.2d 1096 (5th Cir. 1985), *cert. denied,* 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1980). The district court granted the FSLIC's motion. Sandia appeals the dismissal.

II

[1] This case is controlled by our interpretation of 29 U.S.C. §§ 1464(d)(6)(C) and 1729(d) in *Hudspeth.* Section 1464(d)(6)(C) provides:

> Except as otherwise provided in this subsection, no court may take any action for or

> toward the removal of any conservator or receiver, or, except at the instance of the [FHLBB], restrain or affect the exercise of powers or function of a conservator or receiver.

Section 1729(d) further provides:

> In connection with the liquidation of insured institutions, the [FSLIC] shall have power to carry on the business of and to collect all obligations to the insured institution, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith subject only to the regulation of the [FHLBB]. . . .

In *Hudspeth,* we held that these provisions allow judicial review of claims against insured institutions in receivership only after the FSLIC and the FHLBB act on those claims. 756 F.2d at 1103. In the present case, Sandia desires to have the district court hear its action against Vernon and Vernon FSA despite the FSLIC's present receivership. Because *Hudspeth* precludes the district court from hearing Sandia's action, the dismissal was proper.

[2] Sandia nevertheless contends that we should reconsider the *Hudspeth* holding under the facts of this case. Obviously, one panel of the Fifth Circuit cannot overrule a decision of another panel. To obtain reconsideration of Fifth Circuit precedent, Sandia must petition for rehearing en banc. At any rate, Sandia has failed to distinguish the facts of the instant case from

Hudspeth; its argument that the FSLIC's unreasonable delay has caused injury does not alter the analysis of the statute.

Sandia also argues that the statute is unconstitutional. First, it claims that section 1729(d) delegates functions to the FSLIC which must be performed by Article III courts. Second, it claims that the statute deprives Sandia of due process in the consideration of its claims against Vernon and Vernon FSA because the administrative process causes unreasonable delay and because the process lacks procedures to give Sandia access to information necessary to support its claims.

[3, 4] Fifth Circuit precedent also disposes of Sandia's constitutional arguments. We have held in similar cases that constitutional challenges to the FSLIC's exclusive jurisdiction and section 1464(d)(6)(C) and 1789(d) are not ripe for review until the administrative process is exhausted. *Thomes v. Equitable Savings & Loan Ass'n,* 837 F.2d 1317, 1318 (5th Cir. 1988); *Coit Independent Joint Venture v. First South, F.A.,* 829 F.2d 563, 564-65 (5th Cir. 1987), *cert. granted,* __ U.S. __, 108 S.Ct. 1105, 99 L.Ed.2d 267 (1988). Since Sandia has not exhausted its possible remedies with the FSLIC and FHLBB, it cannot now challenge the constitutionality of the administrative process. We are not convinced by Sandia's assertions that it falls within an exception to the exhaustion doctrine. Sandia claims that three traditional exceptions apply here: first, the administrative remedy would be so unreasonably delayed as to create a serious risk of irreparable injury; second, it seeks to have the statute declared unconstitutional and administrative action would leave standing the constitutional issue; third, the ques-

tion of the adequacy of the administrative remedy is for all practical purposes co-extensive with the merits of the constitutional claim. *See Patsy v. Florida International University,* 634 F.2d 900, 903-04 (5th Cir. 1981), *rev'd on other grounds,* 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). Except for complaints about delay, however, Sandia does not support its conclusory assertions with facts evidencing an irreparable injury which it is suffering by the delay. Nor does Sandia explain why the administrative process cannot satisfy its claims or why exhausting the administrative process will not aid in the adjudication of any remaining constitutional challenges. In *Thomes,* we decided that not until we could review in full the administrative proceedings could we intelligently and cogently address whether the proceedings satisfy constitutional requirements. 837 F.2d at 1318. The instant case is no different. Sandia's speculations about future delays and about the probability that it would have received summary judgment in district court are insufficient to ripen its constitutional claims.

III

Under *Hudspeth,* claims against insured institutions which are in receivership must be made within the administrative process of the FSLIC and the FHLBB. Furthermore, claims that the administrative process is unconstitutional are not ripe for review. Accordingly, the district court's dismissal of Sandia's claims against Vernon and Vernon FSA is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

SANDIA FEDERAL SAVINGS & LOAN ASSOCIATION,
Plaintiff,

v.

VERNON SAVINGS & LOAN ASSOCIATION and VERNON SAVINGS & LOAN ASSOCIATION, FSA,
Defendants.

No. CA 3-87-0035-C

ORDER

The motion to dismiss by Federal Savings and Loan Insurance Corporation ("FSLIC") as receiver for Vernon Savings & Loan Association, F.S.A., comes on for consideration by this Court. After a review of all pleadings and arguments of counsel, this Court orders that this case be dismissed in its entirety based on the precedent of *North Mississippi Savings & Loan Ass'n v. Hudspeth,* 756 F.2d 1096 (5th Cir. 1985), *cert. denied,* 474 U.S. 1054 (1986). This Court is cognizant that FSLIC waited over four months to establish administrative procedure with which plaintiff must now comply, but such delay, while possibly unreasonable, is not tantamount to a waiver. Further, no statutory authority exists for the Court to act if a waiver occurs. 12 U.S.C. § 1464(d)(6)(C) expressly prohibits judicial intervention.

If the administrative process does not fairly adjudicate plaintiff's claims, plaintiff's resort is a challenge of the administrative process estab-

lished by FSLIC. Further, if plaintiff has been damaged by FSLIC's delay in establishing an administrative process for handling claims in its receivership, plaintiff's remedy is a separate suit alleging such a cause of action against FSLIC.

It is so ORDERED this 25th day of March, 1988.

The Clerk shall furnish a copy hereof to each attorney of record.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 88-1278
Summary Calendar

D.C. Docket No. CA-3-87-0035-C

SANDIA FEDERAL SAVINGS & LOAN ASSOCIATION,
Plaintiff-Appellant,

versus

VERNON SAVINGS & LOAN ASSOCIATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before CLARK, Chief Judge, JOHNSON, and JOLLY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

October 14, 1988

Attest: GILBERT E. GANUCHEAU
Clerk, U.S. Court of Appeals,
Fifth Circuit

/s/ P. Keller
Deputy

New Orleans, Louisiana

ISSUED AS MANDATE: NOV. 7, 1988